No. 1086.

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

Los Angeles Traction Company,
(a corporation),
Plaintiff in Error,

vs.

John Martin Connolly et al.,
Defendants in Error.

PETITION FOR REHEARING.

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To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The defendants in error respectfully ask a reconsideration and rehearing of this cause for the following reasons and upon the following grounds:

THE DECISION OF THIS COURT IN EFFECT DETERMINES THAT IN NEGLIGENCE CASES WHERE THE DEFENSE OF CONTRIBUTORY NEGLIGENCE IS RELIED ON, THE INSTRUCTION APPROVED IN THE LANDRIGAN CASE AS TO A PRESUMPTION OF THE EXERCISE OF ORDINARY CARE BY A PER-

SON KILLED MAY NOT BE GIVEN WHERE THERE IS ANY CIRCUMSTANTIAL EVIDENCE FROM WHICH THE JURY MIGHT INFER CONTRIBUTORY NEGLIGENCE. THIS DECISION IS OPPOSED TO THE RULE THAT SUCH PRESUMPTION MAY BE CONSIDERED EXCEPTING WHERE THERE IS DIRECT EVIDENCE OF CONTRIBUTORY NEGLIGENCE, AS RECOGNIZED IN THE LANDRIGAN CASE.

"A single rig came out of the darkness and started across the tracks in front of me."

This testimony of the motorman is the only evidence respecting the conduct of the deceased before the collision. Neither the motorman nor any other witness testified as to his conduct before he started across the tracks in front of the car and before the motorman saw him. There is no testimony whatever that deceased did not look or listen or stop to do so, before the "single rig came out of the darkness and started across the tracks." The motorman's testimony only throws light on the movements of the cart and deceased when they were already entering on the tracks.

What did deceased do as and when he entered Vermont Avenue, an eighty foot street, and before he crossed the west track in front of the motorman? Nobody offered any testimony on this point. Then were not defendants in error justly entitled to the presumption instruction approved by the Supreme Court?

(1.) It is submitted that the case of Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, 48 L. Ed. 262, is controlling of the propriety and application to the facts of the case at bar of the instruction complained of; and inasmuch as we did not in our brief filed on behalf of defendants in error, enter into a comparative consideration of the facts in that case as disclosed by the statement made by the learned Justice of the United States Supreme Court with the facts presented on the record here, we request the indulgence of this court in such further consideration now, as we believe this court has erred in holding that the facts there are not so similar to the facts here as to warrant the application and giving of the instruction approved in that case.

In the Landrigan case it appeared that the deceased was familiar with the crossing where he met his death, and was in the habit of passing over it each night about the time when the train known as the midnight express for New York passed and the evidence was uncontradicted that this train known as No. 78 passed over the crossing where deceased was killed at practically the same time as the runaway Pullman car which it was contended struck deceased. There was no evidence but that the headlight on the locomotive of the train No. 78 threw a brilliant light and gave warning of the approaching train so that, seeing it, no careful person would attempt to cross any of the tracks, for it is a matter of common knowledge that in the dark it is difficult to determine upon which of several closely adjoining tracks a train is approaching, especially where the sight

is more or less confused or blinded by a brilliant headlight. Moreover it appears in that case without contradiction that there was a white light in the vestibule of the runaway Pullman car at the end approaching the crossing, which light could and would be seen by any one who looked towards it, and from where the deceased attempted to cross. To quote from the statement in that case:

"One standing on the inside of the gate in the open space, you could look straight up the track to the eastward, and there was nothing to break your view." Further, it " 'was not a clear night, nor was it a real dark night,—there was no moon and there were a few clouds.' The crossing was lighted up by street lamps located on each side of the four corners, and there was an electric light in the reservation north of the tracks, and another one south and east of the tracks near the signal tower."

In the case at bar the night was dark and foggy, and there was no moon, although as stated by the learned Judge it appears from the uncontradicted testimony there was no difficulty in seeing from 30 to 40 yards. At the crossing of Jefferson street and Vermont avenue, where this accident happened, there were no street lights whatever, and it is apparent therefore that a traveler on either of these streets would have to depend upon his faculties of sight in comparative darkness and hearing to become advised of the approach of a car.

There is no dispute of the fact that the car which struck deceased's cart was running at an unlawful speed, that is to say, in excess of the limit of eight miles per hour fixed by an ordinance of the city of Los Angeles: and we submit that the evidence as to the car being

lighted or the bell thereon sounded is so conflicting as not to justify this court in disregarding the verdict of the jury, which is in effect a finding therefrom that the defendant was negligent in the respects charged and proved to the satisfaction of the jury.

Now as to whether there was evidence tending to show contributory negligence on the part of the deceased; considerable stress is laid, and evident importance is attached by the learned Judge who wrote the opinion of this court to the showing made by the evidence of the amount of intoxicating liquor taken by the deceased on the night of the accident. But we respectfully contend that this is not an element in the case proper to be considered, for there was not one word of testimony to the effect that deceased was intoxicated or even over stimulated at the time of or prior to the accident. And again we say, that the verdict of the jury is, as to this court, conclusive of whatever possible or suggested consideration should be given to this matter of drinking. Again it is pointed out by the learned Judge that the evidence shows that the horse driven by deceased was galloping just prior to and at the time of the accident and was in a "sweaty" condition immediately after the accident, but we direct attention to the fact that the evidence also shows that the deceased had driven this horse from the upper part of the city down to what may be termed the suburbs, a distance of several miles, as the court knows, and therefore we submit the "sweaty" condition of the horse could hardly be considered as corroborative of reckless or careless driving; nor is it, nor the fact testified to by the motorman that just prior to and at the time of the

accident, the horse was galloping more than circumstantial evidence that the deceased had not prior to attempting the crossing, looked and listened for any approaching car, or, if from his point of observation, stopping was necessary to make such observation effective, that he had not slowed down or stopped. In this connection we remind this court that it is a matter of common knowledge that a horse when frightened as this one must have been will break into a sweat and sometimes stand still after the moment of danger has passed apparently spiritless, even as fright will affect a human being. The further element commented on by this court that the evidence tended to show that deceased was driving in a diagonal direction, this suggesting that he was endeavoring to go across the track in front of the approaching car and assuming the risk of such an attempt is certainly susceptible of the understanding that having put his horse into a gallop, to perhaps overtake his friends who were driving in front of him, he did not see the car until it was almost upon him, taking into consideration the evidence that the car was not lighted nor the bell sounded, and then he naturally and instinctively turned his horse in a diagonal direction in an effort to avoid the collision, there being in such a situation no opportunity for him to stop his horse in time. The testimony of the motorman we think should be weighed and considered by this court as it was by the jury who evidently disregarded it, as coming from one who may scarcely be deemed a disinterested witness; but even he says that he did not see the deceased until his car or the front end thereof was within the lines of the crossing of Jefferson street. Then he

says it was that "a single rig came out of the darkness and started across the tracks in front of me." This is the only *direct* testimony as to the conduct of the deceased and we submit that there is not one word of testimony as to the conduct of deceased prior to this time, and as he approached the crossing. There is not a word of testimony as to whether deceased looked or listened or stopped to do so; and it seems to us that the evidence here presented is equally deficient as to *direct* evidence of the conduct of the deceased with respect to stopping or looking or listening as in the Landrigan case.

In the Landrigan case there was nothing in the evidence tending to show any necessity for the deceased to stop in order to make his observations effective, for it appears there he could look straight up the track to the eastward and there was nothing to break his view; and we contend that there was no necessity shown by the evidence in the case at bar for the deceased to have stopped to have made his observations effective; yet the Supreme Court in the case referred to did not criticize the inclusion within the presumption of stopping as an element of ordinary care which might be involved in a case of that sort as expressed in the instruction there approved, nor does the Supreme Court in that case consider that the facts disclosed by the record were sufficient evidence of contributory negligence to eliminate the proper application of the presumption of ordinary care.

We submit that there is an entire absence of evidence in the case at bar as to what if any precautions were taken or observations made by the deceased as he ap-

proached the crossing where the accident happened, and if much consideration should be given to the evidence commented on by the learned Judge who wrote the opinion of this court it would necessarily be only such consideration as is due and given to circumstantial evidence. Surely the trial court fairly directed the attention of the jury to this feature of the case for in the instruction criticised as erroneously given it was expressly stated: "But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen."

We urge that the facts disclosed on the record of this case warranted the giving of the criticised instruction within the doctrine approved by the Supreme Court in the Landrigan case, and it seems to us that the opinion of this court is in effect opposed to that decision.

(2.) In the opinion of this court certain cases are cited as authority to the proposition stated as follows: "Where there is evidence upon the question of alleged contributory negligence, the case should be determined upon the evidence, and not upon a presumption that arises only in the absence of all evidence."

We wish however to direct the attention of this court to the fact that the authorities cited do not seem to go

to the extent of the doctrine above stated, at least as applied to the case under consideration, and therefore are not in point. We briefly state the substance of the decisions cited as follows:

In the case of Philadelphia, W. & B. R. Co. v. Stebbing, 62 Md. 504, the injured person was not killed and testified himself as to what he did and when he looked for an approaching train. This decision therefore is not of controlling importance for there was *direct* evidence from which the jury might find contributory negligence.

The case of Salyers v. Munroe, 104 Iowa 74, is scarcely in point, for there it was said by the court in part (italics ours):

"The jury was thus instructed to consider 'the natural instinct of man to guard himself against danger, and preserve himself from injury' in determining whether plaintiff was guilty of contributory negligence. It is settled that such an instruction may be given where the care exercised by a person at the time of an accident *which caused his death is in question, and direct evidence as to such care used cannot be had.* Way v. Railroad Co., 40 Iowa, 342. But, where there is such evidence, the instinct of self preservation cannot be given any weight. Dunlavy v. Railway Co., 66 Iowa 439; Whitsett v. Railway Co., 67 Iowa 157; Reynolds v. City of Keokuk, 72 Iowa 372. The eleventh paragraph of the charge was therefore erroneous, for the reason that *the plaintiff gave direct testimony respecting the care he used at the time of the accident.*"

It will be seen that this was not a case where the plaintiff was killed by the accident, but himself testified directly. Also it should be borne in mind that under the rule followed in Iowa the burden is with a plaintiff to disprove or show freedom from contributory negligence.

And with respect to the other Iowa case cited, Bell v. Clarion, 113 Iowa, 126, it is pertinent to direct attention to the fact appearing that the plaintiff therein was not killed and testified in her own behalf. The court reviews the Iowa decisions and expressly recognizes that a presumption such as the one included in the criticised instruction in the case at bar is allowable where the injured person is dead and there is not *direct* evidence on the question of contributory negligence which must be disproved or negatived by plaintiff's case.

So far as we can see the only point decided in the North Dakota case of Smith v. Northern Pac. R. Co., 53 N. W., 173, was that the presumption of negligence from the setting out of a single fire by an engine is one of law, and whether such presumption has been fully met and overthrown is in the first instance a question for the court. Evidence examined and *held* sufficient to overthrow the presumption in this case.

And the Utah case of Olmstead v. Oregon Short Line R. Co., 76 Pac. Rep. 557, seems only to go to the point that the *prima facie* case made by plaintiff suing a railroad company for damages from a fire, by showing that it was started by an engine, is rebutted by proof that the engine was provided with necessary and proper appliances for preventing the escape of sparks and coals of fire, and that it was carefully operated; and, unless plaintiff's case is further aided by other proof of negligence, defendant is entitled to a verdict.

In the case at bar there certainly was no direct evidence of deceased's failure to stop or look or listen, and

there was clearly sufficient evidence of defendant's negligence to sustain the verdict.

The Dakota case of Volkman v. Chicago, St. P., M. & O. R. Co., 37 N. W. Rep. 731, was a stock killing case and the decision is to the effect only that where plaintiff, in an action against a railroad company, establishes a *prima facie* case of negligence under Code Civil Proc. Dak. sec. 679, by proving the killing of stock by defendant, and defendant then introduces evidence that there was no negligence or want of ordinary care and skill on its part, plaintiff offering no evidence in rebuttal, a verdict should be directed for defendant.

The other Dakota case, Huber v. Chicago, M. & St. P. Ry. Co., 43 N. W. 819, is of the same character, and decides that Code Civil Proc. Dak. sec. 679, providing that the killing of a horse or any stock by a train along a railroad shall be *prima facie* evidence of the negligence of the railroad company, creates no new liability, but merely changes the order of proof; and recovery cannot be had in an action where there is unrebutted evidence that the railroad company was not negligent.

And the Georgia case, Seaboard Air Line Ry. v. Walthour, 43 S. E. Rep. 720, is the same class of case, i. e., one for damages for killing stock, and the decision is to the same effect as the foregoing.

It will be observed that the last five cases cited by the learned Judge of this court are cases where the defendant overcame the presumption by *direct* evidence which was not rebutted. And in the first three of these cases

the injured person testified and gave *direct* testimony upon the question of contributory negligence.

The following cases tend to support the view we are here contending for:

The presumption of law is that the person killed at a crossing did stop and look, and listen, and the presumption will prevail in the absence of *direct* testimony on the subject.

Mynning v. Detroit, L. & N. R. Co., 7 West. Rep. 324, 64 Mich. 93.

McBride v. Northern Pac. R. Co., 19 Or. 64.

The plaintiff is under no obligation to repel any presumption arising from the mere fact of a collision between a person riding across a railroad track and a train of cars that he did not look or listen, or, if he did, rode heedlessly and purposely to his death.

Gugenheim v. Lake Shore & M. S. R. Co., 9 West. Rep. 903, 66 Mich. 150.

In the absence of evidence of inattention or recklessness of the deceased, who was killed by falling from a gutter on which he was at work, the presumption is that he was in the exercise of ordinary care.

Fugler v. Bothe, 43 Mo. App. 55.

Where one is found killed on a railroad crossing, in the absence of evidence the presumption is that he exercised all the precautions that due regard for his own safety and that of others required. In such cases the circumstances in evidence are sometimes sufficient to warrant

the inference of negligence, *but such inferences are always for the jury.*

Longenecker v. Penn. R. Co., 105 Pa. 332.

Although from the uncontradicted evidence it might have been inferred that if the traveler had stopped and looked and listened he would have seen the approaching train, *it was for the jury to determine the facts.*

Penn. R. Co. v. Weber, 76 Pa. 157, 18 Am. Rep. 407.

The proper limitation of the rule is we think fairly stated as follows:

Where there is no *direct* testimony on the subject the presumption will prevail, but where there is *affirmative, direct, and credible testimony of contributory negligence* the presumption is rebutted and displaced.

Reading & C. R. Co. v. Ritchie, 102 Pa. 433.

We invite the court's attention particularly to the following case which it seems to us is on all fours with, or rather the evidence therein tending to show contributory negligence is stronger than in the case at bar, and we believe the limitation expressed in this decision is the true rule and its spirit and principle should control in the case at bar;

In Davenport, Rock Island & Northwestern Ry. Co. v. De Yaeger, 112 Illinois Appellate Court Reports, 537, the facts are set forth in the opinion as follows:

"The accident occurred about half-past six o'clock a. m., as deceased was on his way to his day's work. It was not yet full daylight. It was cold, and the witnesses agree that the weather was unsettled. Some said it was

misty, some that it was storming. The state of the weather interfered with seeing an object at a *great* distance. Third avenue runs in an easterly and westerly direction, and the railroad crosses it diagonally running from the northwest to the southeast. The construction train consisted of an engine headed east, the headlights of which were not lighted, and ahead of it a box car, on the front end of which were two lanterns showing red lights. Inside the box car was a gang of men going to work. There was a brakeman, but he was inside the car, and not at the brakes, which were on top of the car. Deceased was working for an ice company. The tools with which he was to work were on the south side of the railroad in a building near this crossing, the place where he was to work was on the north side of the railroad. Deceased came to the building, got his tools and started over the crossing on the street. An ordinance of the city limited the speed of all other than passenger trains to six miles per hour. There was proof for plaintiff that the train was running ten or fifteen miles per hour at the time of the accident, and some of defendant's witnesses testified to the same thing, while other of defendant's witnesses fix the speed at six or eight miles per hour, and the engineer of the train practically conceded that he was running in violation of the ordinance. There was proof that no bell was rung or whistle sounded as required by the statute, and other proof that the bell was rung and the whistle sounded. The condition of the proof would not warrant us in disturbing the verdict of the jury, which we construe as a finding that defendant violated both the ordinance and the statute, and was guilty of negligence causing the death of deceased. Defendant urges that deceased was negligent, and that his negligence contributed to the injury, and therefore there can be no recovery. Crosby, a workman, was a short dis-

tance behind deceased. He testified that he heard the train coming and looked and saw it, and that he did not see deceased turn and look towards the coming train, and he thought deceased could have heard it. He however, further testified that he could not tell whether deceased looked or listened, and that he was not close enough to him to see whether he looked or listened. If deceased looked he may not have seen the approaching train both because of some obstruction which the witnesses show existed at that point, where the railroad was on a curve, and because it was a misty, stormy morning, and because the train had no headlight; and if he did see it he had a right to rely upon defendant's obedience to the ordinance."

After considering other questions, the court said: (Italics ours.)

"The only error assigned and argued in this case that we regard as of serious importance is the action of the court in giving the 13th instruction requested by the plaintiff, which told the jury, among other things, that in determining whether deceased was exercising due care, the natural instincts prompting to the preservation of life and the avoidance of injury and consequent suffering and pain, may enter into the consideration of the jury. Defendant urges that there was an eye-witness of this accident, Crosby, and that the rule referred to in that part of the instruction just stated is only operative where there is no eye-witness who can describe the conduct of the deceased at the time of and just prior to the accident. That the right of the jury to take into consideration the natural instincts which prompt one to the preservation of life and the avoidance of injury is limited to cases where the accident is not seen by an eye-witness, seems to be indicated in Illinois Central R. R. Co. v.

Nourcki, 148 Ill. 29; C. & E. I. R. R. Co. v. Heerey, 203 Ill. 409; and C. R. I. & P. Ry. Co. v. Keely, 103 Ill. App. 205. In C. B. & Q. R. R. Co. v. Gunderson, 174 Ill. 495, and C. B. & Q. R. R. Co. v. Beaver, 199 Ill. 34, it is not stated that the rule is only applicable where no one saw the accident, but the opinion in each of those cases specially notes the fact that no one saw the accident. On the other hand, in B. & O. S. W. Ry. Co. v. Then, 159 Ill. 535, and C. C. C. & St. L. Ry. Co. v. Keenan, 190 Ill. 217, the rule is laid down in general terms that the instincts of self-preservation may be considered in determining whether deceased exercised due care; and there is no suggestion in those cases that no one saw the accident there, or that the rule is limited to such cases. *If the instincts tending to self-preservation should not be considered when there is an eye-witness of the accident, that limitation should only apply to cases where a witness has seen and is able to describe the conduct of the deceased at the time of and just prior to the accident.* The mere fact that the eye of a witness may have incidentally rested upon the deceased at the time of and just before the injury, ought not to deprive plaintiff of the presumption arising from the instincts of self-preservation. In the present case, Crosby did not know deceased, and while he says he did not see deceased look and listen, yet he evidently did not look at him all the time as deceased approached the crossing, for Crosby testified he himself looked and saw the approaching train (at which time of course he was not looking at deceased), and that he considered with himself whether he had time to go over the crossing before the train would reach it, and, further, that he was not close enough to deceased to see whether he did look for the train or listen for it, and could not tell whether deceased looked or listened. While, therefore, he saw deceased, he did not look at him all the

time, and he did not observe whether deceased took any precautions to ascertain the approach of the train. *We therefore conclude that we ought not to disturb this verdict, otherwise just and supported by the proof, because of this expression in the 13th instruction."*

(3.) In our brief for defendants in error filed in this case, we assumed in favor of the position taken by plaintiff in error that the instruction criticised did in effect indicate to the jury the court's opinion on or view of the evidence. And we cited authority in support of the proposition that the trial court had the right to do this if it saw fit. If then the trial court having the opportunity of observing the manner of the witnesses when testifying, did not either believe them or considered that their testimony did not tend to establish contributory negligence on the part of the deceased, we say it was not error for the court to indicate its views of such evidence. But the trial court did not we think go to any extreme in this matter for by the instruction critised it was merely suggested to the jury that in the absence of all evidence to the contrary they might consider the presumption that deceased did stop, look and listen before crossing the track, and immediately following this suggestion, if it may be called such, qualified it by directing the jury's attention to the fact that the presumption could be rebutted by circumstantial evidence and it was for them to say whether from the facts and circumstances proved in this case the presumption was rebutted.

In the Landrigan case this view of the instruction there and here complained of was not discussed or consid-

ered so far as the record shows, but we submit that it bears out the position taken and the views expressed therein.

We earnestly urge upon this court the propriety of granting a rehearing of this case that the question involved may be more fully argued, orally if so desired by the court; and the question of the propriety of the instruction as to the presumption of ordinary care in the absence of evidence of contributory negligence as applied to this case where the only suggested evidence of contributory negligence is circumstantial, and not direct, may be certified to the Supreme Court of the United States if the Honorable Judges of this court be divided thereon, for a ruling thereon, to the end that justice to the defendants in error here may not be denied.

Dated February 18th, 1905.

Respectfully submitted,

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JOSEPH SCOTT,

Attorneys for Petitioners and Defendants in Error.

S. C. PARDEE,

Of Counsel.

We, Isidore B. Dockweiler and Joseph Scott, attorneys for defendants in error in the above entitled cause, and petitioners therein, and S. C. Pardee, of counsel for said defendants in error and petitioners, do hereby certify that the foregoing petition for rehearing of said cause is in ~~their~~ our judgment, well founded and that it is not interposed for delay.

Dated February 18th, 1905.